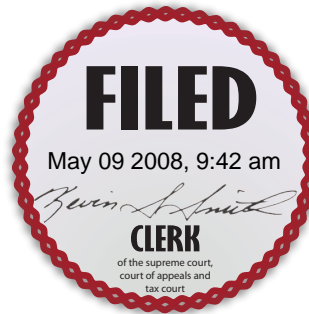


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DAVID R. EGGERT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0712-CR-682
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Tanya Walton Pratt, Judge  
Cause No. 49G01-0608-FA-159479

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**May 9, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

David R. Eggert appeals from his convictions for two counts of Child Molesting, as Class C felonies. Eggert presents a single issue for review, namely, whether the evidence is sufficient to support his convictions for child molesting.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

In 2002, Eggert lived with his then girlfriend, Jennifer Eggert, and her children, B.W., a daughter ten years old, and A.G., a son.<sup>1</sup> The family lived in various locations in central Indiana, eventually moving to a house on Bobcat Trail in Marion County. In 2006, B.W. told her aunt and, later, her maternal grandmother that Eggert had molested her multiple times since 2002.

On August 25, 2006, the State charged Eggert with one count of child molesting, as a Class A felony; two counts of child molesting, as Class C felonies; and one count of intimidation, as a Class A misdemeanor.<sup>2</sup> Eggert waived trial by jury, and, on August 9, 2007, the case proceeded to bench trial. At the conclusion of the evidence, the trial court found Eggert guilty of two counts of child molesting, as Class C felonies, and one count of intimidation, as a Class A misdemeanor. The court initially took the charge of child molesting, as a Class A felony, under advisement.

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<sup>1</sup> The birthdate for A.G. is not provided, but the record indicates that A.G. is younger than B.W. Also, Eggert and Jennifer Eggert married on January 12, 2007.

<sup>2</sup> On September 6, 2006, the State amended the charging information to correct clerical errors in the cause number and to clarify the class of misdemeanor charged for intimidation.

On August 17, 2007, the trial court held a sentencing hearing. The court found Eggert not guilty of child molesting, as a Class A felony, and entered a judgment of conviction on the C felonies accordingly. The court sentenced Eggert to four years for each count of child molesting, with two years executed and two years suspended to probation, and to one year for intimidation, suspended. The court ordered the first child molesting count to be served consecutive to the intimidation count, for an aggregate executed sentence of two years. Eggert now appeals.

### **DISCUSSION AND DECISION**

Eggert contends that the evidence is insufficient to support his convictions for child molesting, as Class C felonies. When reviewing a sufficiency of the evidence claim, we neither reweigh the evidence nor judge the credibility of witnesses. Walsman v. State, 855 N.E.2d 645, 648 (Ind. Ct. App. 2007). Rather, we consider only the evidence that is favorable to the conviction along with the reasonable inferences to be drawn therefrom to determine whether there was sufficient evidence of probative value to support a conviction. Dorn v. State, 819 N.E.2d 516, 518 (Ind. Ct. App. 2004), trans. denied. We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. Walsman, 855 N.E.2d at 648.

To prove the offense of child molesting, as a Class C felony, the State was required to show that Eggert, while at or over the age of twenty-one, performed or submitted to any fondling or touching with B.W., who was then between ten and thirteen

years of age, with the intent to arouse or to satisfy Eggert's sexual desires. See Ind. Code § 35-43-4-2(b). Eggert argues that the evidence is insufficient because his conviction was based solely on B.W.'s testimony, which, he contends, was "totally improbable," Appellant's Brief at 6, and "equivocal," Id. at 7. In short, Eggert argues the incredible dubiousity rule applies, barring his convictions. We cannot agree.

"The 'incredible dubiousity' doctrine applies 'where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt.'" Baber v. State, 870 N.E.2d 486, 490 (Ind. Ct. App. 2007) (quoting Thompson v. State, 765 N.E.2d 1273, 1274 (Ind. 2002)). "Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.'" Id. (quoting Krumm v. State, 793 ne2 1170, 1177 (Ind. Ct. App. 2003)).

Here, Eggert argues that B.W.'s trial testimony of multiple acts of molestation was "totally improbable" because B.W. alleged that some of the acts occurred while she was lying next to her mother, who was asleep at the time. But Eggert does not demonstrate how that testimony makes the possibility of multiple acts improbable. Whether such events could take place next to B.W.'s mother without waking her goes to the weight of the evidence, and we will not reweigh that evidence. See Walsman, 855 N.E.2d at 648. And, in any event, B.W. also testified that the acts also occurred during the same time period, between 2002 and 2006, in her own bedroom or in the living room. Thus, Eggert's argument on this point must fail.

Eggert also contends that B.W.’s testimony that Eggert rubbed his penis on her vagina is improbable because she never testified that there was penetration and, despite the lack of penetration, B.W. thought she might be pregnant. But Eggert has not demonstrated, nor can he, that such contact necessarily leads to penetration or that such contact cannot result in pregnancy. As such, his contention on this point also must fail. Eggert also maintains that the trial court’s acquittal on child molesting, as a Class A felony, somehow affects B.W.’s credibility. He notes that the trial court said B.W.’s testimony was inconsistent as to whether there was penetration. But penetration is an element of the Class A felony charge, and it is not an element of the Class C felony charges. As such, Eggert’s contention is without merit.

Eggert next characterizes B.W.’s testimony as equivocal. In support, he notes that, “[d]espite the constant molestations, [B.W.] never told her mother, her aunt, her grandmother, or any counselor or teacher at school.” Appellant’s Brief at 7. But Eggert does not demonstrate how B.W.’s delay in reporting renders her testimony at trial equivocal.<sup>3</sup> In short, Eggert has not demonstrated that no reasonable person could have believed B.W.’s testimony as to any of the points addressed above. As such, his argument that the incredible dubiousity rule bars his convictions is without merit.

B.W. testified that on several occasions Eggert touched her vagina, chest, and buttocks with his hand under her clothes. She also testified that he forced her to place her

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<sup>3</sup> Eggert also contends that B.W. did not report to the Marion County Family Advocacy Center that oral sex had occurred but that she testified in her deposition and at trial to that event. He also argues that B.W. testified that she had never seen Eggert’s penis because it was dark when the incidents occurred, but she then described it as “like a finger” and “it has a top.” Transcript at 60. Eggert provides no analysis of why such testimony is improbable or equivocal. As such, the arguments are waived. See Ind. Appellate Rule 46(A)(8)(a).

hand on his penis and rubbed his hand and his penis on her vagina. A conviction for child molesting may rest solely on the uncorroborated testimony of the alleged victim. Baber v. State, 870 N.E.2d 486, 490 (Ind. Ct. App. 2007). To the extent Eggert argues that B.W.'s inconsistent and sometimes troubled relationship with her mother affected the reliability of B.W.'s testimony, such is merely a request that we reweigh B.W.'s credibility, which we cannot do. Walsman, 855 N.E.2d at 648. We conclude that the evidence here is sufficient to support Eggert's convictions for child molesting, as Class C felonies.

Affirmed.

SHARPNACK, Sr.J., and DARDEN, J., concur.